SAMPLE EXAMS

"Now does this violate the Rule Against Perpetuities?"

Note: This exam was given by an SMU Professor while visiting at W&L - it's included here as a good example of an extensive essay exam.

QUESTION ONE

(Weight: Approximately 25% of the final exam grade)

You are the best lawyer in the General Counsel's office of the Tesla Motor Company, a publicly traded manufacturer of luxury electric cars. Tesla's corporate headquarters and its only factory are located in California. In 2008, Tesla became the first company to sell fully electric cars. Some called this a "disruptive and unfamiliar technology." Tesla unsettled an automotive industry that had sold gas-powered automobiles for over a century. Tesla's cars are fueled by lithium-ion batteries that can power the vehicle for 200 miles on a single charge. Despite their very high price tags, Tesla's cars are gaining popularity.

Tesla's product is not the only disruptive and unfamiliar aspect of the company. So is its business model. Traditionally, American automotive companies sold their cars through a dealership franchise system.[1] Car dealerships make money through car sales and sideline profit centers like the sale of auto parts or used cars, but mostly through their service departments.

Tesla rejected the franchise system in favor of a direct sales model. The company wants complete control over its product as it struggles to compete and change the way Americans think about cars. Tesla also does not want to fall under dealership franchise laws that exist in many states. These generally prohibit automakers from any ownership stake in the dealerships franchised to sell their cars and forbid franchisors from otherwise competing against franchisees.

So Tesla does not franchise. Instead, the Tesla Motor Company operates "galleries" (a fancy California way of saying "showrooms"). These are usually narrow storefronts in high-end shopping malls where you can *look* at a Tesla car and *talk* to a knowledgeable, young, hipster-type Tesla employee about all of its design features, environmental virtues, and general total coolness. *But you cannot buy a Tesla there*. To do so, you must go to www.teslamotors.com all by yourself and submit your order online directly to the company. Your custom-manufactured Tesla may be picked up at the factory or shipped to you. Tesla boasts that its cars need very little maintenance (the website says its cars are "an app on four wheels"). Much can be done remotely, like a software update. The company has a "valet" maintenance service, which makes house calls, for any hardware issues its cars might require.

[1] For Your Reference: An automotive dealership franchise is a contractual grant by a car manufacturer (the "franchisor," e.g. Ford or Chrysler) to a private entrepreneur (the "franchisee") of the sole right to sell its cars in a certain geographic area, often with exclusive rights to use a particular trademark.

Suffice to say, traditional car dealership franchisees feel threatened by a future represented by Tesla's galleries and its direct sales model. The Virginia Coalition of Automotive Retailers (VCAR) aggressively lobbied the Virginia General Assembly for a bill that was just signed into law by Governor Terry McAuliffe (whose recent election campaign received much more financial support from Virginia car dealers and their lobbying arm, VCAR, than from this upstart California car manufacturer):

> **Section 1. Findings.** The General Assembly finds that car dealers are an important source of information and support to Virginians in search of reliable, economical, and safe motor vehicles. Historical evidence indicates that manufacturers have often competed against their own franchisees, taking advantage of their monopoly control over car production to raise prices and pit franchisees against each other.
>
> **Section 2. Prohibition of Unlicensed New Motor Vehicle Sales.** No new motor vehicle may be sold to anyone in the Commonwealth of Virginia except one purchased from a Virginia-licensed dealer.
>
> **Section 3. Licensing.** Licenses to sell new motor vehicles shall be issued by the Commonwealth's Department of Motor Vehicles (DMV) to proper persons. In order to be granted a license, an applicant for a license must:
>
> (a) Be of sufficient good character, in the discretion of the DMV Chief Administrator, to be licensed as a dealer. To assist the Chief Administrator in making this determination, he or she may consider an applicant's financial responsibility, whether the applicant has been involved in any illegal activities prior to applying for a license, and other factors;
>
> (b) Be a motor vehicle franchisee, as evidenced by submission to the DMV of a copy of the franchise agreement signed between the applicant and the manufacturer. The applicant may have no legal relationship with the manufacturer other than the franchise agreement between them.
>
> **Section 4. Established place of business.** All licensees selling new motor vehicles shall maintain a permanent, properly identified location of not less than a total of 2,000 square feet within a permanent, enclosed building and where there are included or immediately contiguous, clearly identified, fixed facilities to display at least three automobiles and equipment to service motor vehicles sold by the licensee.

At the signing ceremony for this new law, Governor McAuliffe says: "This is a great day for Virginia. We recognize today the valued service provided by car salesmen and saleswomen – franchisees who are our neighbors and friends – in protecting the Virginia consumer from the deceits and predation of remote sellers of untested and perhaps even dangerous new technologies. They deserve our support as they seek to develop their businesses, support their families, and strengthen our communities. Theirs is a service industry that contributes to our state economy and also to our social fabric in both tangible and intangible ways."

Jeff Kahn, the General Counsel for Tesla, is your boss. You've never felt that he was the brightest bulb in the box. But after a meeting he called today, you are shocked at just how dim the man really is. The meeting was called to discuss how Tesla should respond to this new Virginia law. Kahn thinks Tesla should aggressively lobby the United States Congress to pass a federal law more favorable to Tesla. He passes around copies of his low-wattage "bright idea":

> **Section 1. Findings.** Congress finds that electric vehicles are essential to the economic and environmental future of our country. This technology must be promoted as a safe and efficient response to American dependence on foreign fuels and as an innovative source of new jobs. Discrimination against electric vehicles and the companies that sell them blights the nation's moral fiber and constitutes a constitutional violation that must be remedied at the national level.
>
> **Section 2. Federal Licensing.** The sale of electric cars shall be licensed exclusively by the Federal Government through the United States Department of Commerce. In order to be granted a license, an applicant for a license must be (a) a citizen of the United States, (b) in the business of electric car sales in at least one State.
>
> **Section 3. Registration of Sales by States.** The Department of Motor Vehicles (or its equivalent) in each State shall process vehicle title and registration papers needed for the sale of electric cars that are sold under federal licenses in the same manner as it would do so for motor vehicles sold by individuals licensed by that State.
>
> **Section 4. Cause of Action for Damages.** Any person may commence a civil suit in federal court for damages against a State's Department of Motor Vehicles (or its equivalent) for violations of § 3.

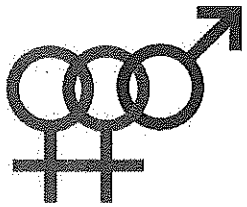
Where did Tesla find this guy? You decide to write Kahn a memo that evaluates (1) the constitutional arguments that Tesla can make (and counter-arguments that Tesla can expect) about Virginia's new law, and (2) the many constitutional problems with Kahn's draft federal statute.

QUESTION TWO

(Weight: Approximately 50% of the final exam grade)

You are an outstanding lawyer practicing in Maine. Today, your first appointment is with a prospective client who has worry written all over her face. "My name is Virginia Fox. I need your help. I'm a top law student at a great law school, Washington & Lee School of Law, but I live here in Maine and I need someone who is already admitted to the state's bar." Virginia takes a deep breath. Then she continues.

"First, let me just say that I am bisexual. I'm in a committed relationship with the woman of my dreams, Vita Sackville-North. Now, let me explain this to you. Although I'm sure you are very smart, not everyone understands what bisexuality means. Bisexuality means that I have romantic and sexual feelings toward both men and women. I'm not a lesbian and I'm not searching for my identity – I know who I am. I feel like I need to make that clear because, even in the gay and lesbian community, bisexuality is sometimes not taken seriously." She pulls some papers from her backpack. "Read these and you'll see what I mean," she says.

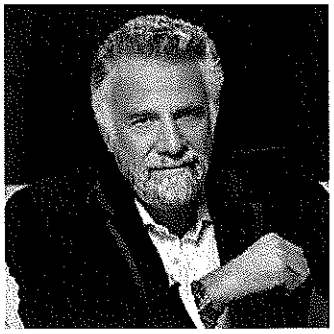


As you set them to one side to read later, you notice that Virginia has given you some newspaper articles. One, from the New York Times, has this quote highlighted in yellow: "Bisexual people are oftentimes misunderstood. They're ignored. They're mocked. Even within the gay community, I can't tell you how many people have told me, 'Oh, I wouldn't date a bisexual.' Or, 'Bisexuals aren't real.' There's this idea that people who say they're bisexual are lying, on their way to being gay or lesbian, or just kind of confused."

Virginia continues: "When the state legislature created civil unions, Vita and I got the first one." You know from your practice that civil unions between same-sex couples are recognized in this state. Partners in civil unions are guaranteed all the benefits of married couples, although the right to the term "marriage" remains reserved under state law for people of different sexes. "I love Vita," Virginia tells you, "but we're apart now for months at a time while I study law at W & L. Law school stress, employment worries, and my own loneliness really get to me. Last summer, I did a terrible thing to her." Another deep breath before Virginia resumes her story.

"Last summer, I worked in Maine first at a private law firm, Wolf & Associates, and then for the state's Attorney General (AG), Leonard Dalloway. I was chosen for both positions under a prestigious new program to promote public service that is administered by Maine's AG's Office. A few top law firms and state offices pool resources to select participants and pay their summer salaries. If both places later offer post-graduation employment, the law firms agree to delay their offers to accommodate a few years of public service." Virginia stares out the window for a moment, as if looking for something. And then:

"Well, at the end of the summer, I had an affair with Orlando Wolf. The affair ended quickly. I felt terrible and confessed to Vita. She was very angry, but we're together again. But Wolf was furious that I left him." You know this name well. Orlando Wolf is a prominent member of the bar, a crack litigator, and very vain. Divorced many times, he is now married to his career. He has powerful friends and is known to be ruthless in pursuit of whatever he wants, at whatever cost. There is reason for Virginia to be afraid of Orlando Wolf. But her initial look of worry is now one of spirited action (her W & L training?)!



"He's punishing me. He made certain that I didn't get an offer from his firm. Fine. But thanks to his connections, I doubt I'll get an offer from the AG's office, either. It has been months, but I haven't received either an offer letter or a rejection letter. No one at the AG's office will return my calls. He's deprived me of my right to a fair hearing, hasn't he?" You can tell that she has Fox v. Wolf or maybe Fox v. Dalloway in mind. And thinks the plaintiff ought to win.

"But there's more. He told me that adultery is a crime and that he has gone to the police to demand that charges be filed. Given his powerful influence, I expect he will get what he wants even at the expense of his own social standing. He is blinded by revenge. But a criminal conviction puts my chance to become a member of the bar at risk."

You are surprised to hear that adultery is a crime. But when you check the statute books, you discover that adultery has been a crime in this state since 1842:

> A person is guilty of adultery if, being married, that person engages in sexual intercourse with another not that person's spouse.

Under the law, therefore, criminal adultery may always be charged against the "married person" but not always against the accessory (e.g. an unmarried person with whom the adultery occurs).

The legislative history behind this distinction is as old as the statute. When the offense was first established, adultery was largely perceived to be the fault of married men who pursued young, unmarried women. The man's disregard for his existing marital bond, and the risk of unwed motherhood that this entailed, offended public morality and risked disruption of marriage's social welfare function. No other justification for the law exists. Criminal sanction was thought a good deterrent for men. Social ostracism was thought enough to deter the unmarried woman.

At this point, Virginia takes some more papers from her backpack. "I'm one of the best con law students in my class," she says. "I found this recent opinion by our state's Supreme Court interpreting 'married' in this law not to include civil unions. The case involved two gay men in a civil union, one of whom had an affair with another gay man." Here are excerpts from the opinion Virginia shows you:

This court is the final arbiter of the intent of the legislature as expressed in the words of a statute. Where terms are not defined in the statute, we ascribe to them their plain and ordinary meanings. A law means what it meant to its framers.

This criminal provision first appeared in 1842, when marriage meant a union between two individuals of the opposite sex. No new definition of "married" has since been added. Our legislature could have done so if it wished to do so; evidently, it did not. Furthermore, our cases from that time period support the inference that "sexual intercourse" meant only heterosexual intercourse because only that conduct could result in pregnancy, with the special potential to disturb the marriage and the social welfare function that marriage then served, especially for the care and upbringing of children.

We reject the argument that our interpretation of the statute subjects individuals to unequal treatment on the basis of sexual orientation. Whether gay or lesbian, persons of the same sex cannot, by definition, engage in the one sexual act uniquely capable of resulting in pregnancy, which this criminal sanction sought to deter. That is a real difference.

Though we take judicial notice that social norms do change, that fact cannot alter the law's meaning. In any event, it is not the function of the judiciary to provide for present needs by an extension of past legislation. Matters of public policy are reserved for the legislature.

Virginia continues: "This judicial opinion will save me! If the state argues that the crime of adultery applies to me, this opinion explains why civil unions must be excluded! Of course, there are several counter-arguments the state could make that we must consider. First, …"

You interrupt her. "Hold on a minute. Those arguments only matter if we can get past the federal 'Defense of Federalism Act.' Did you cover that in your con law course? It sometimes goes by the acronym DOFA."

Virginia gives you a blank stare. "DOFA? Don't you mean DOMA? That was struck down in United States v. Windsor last year." For a moment, you see a look of concern about your professional credentials pass across Virginia's face.

"Here," you say confidently, "look at this." You print out a copy of the Defense of Federalism Act, a new law just passed by the United States Congress and signed by President Obama. You hand the printout to her.

Section 1. Findings of Congress. Congress finds that the definition and regulation of marriage, by history and tradition, has been treated as being within the authority and realm of the separate States. It should be the policy of the Federal Government to defer to state-law policy decisions with respect to domestic relations. The continued active political debate concerning same-sex marriage should be encouraged as the most democratic and stable foundation by which to resolve an important matter of public policy.

Section 2. Jurisdiction of the Courts of the United States. Neither the Supreme Court of the United States nor the United States Courts created by Congress shall review, reverse, vacate, modify, or disturb in any way the rule of any court of any State concerning, related to, or ancillary to the marriage policy of that State.

Section 3. State Legislatures. Prior to the termination date of this statute, in 2024, every state legislature must make an express and binding determination as to the policy in its State concerning the validity of civil unions and their relationship to the legal status of marriage.

"Virginia," you say, "if you want access to the federal courts, I think the first step is to evaluate the constitutionality of DOFA. If its constitutionality can be attacked, then we can discuss your arguments and counterarguments concerning the constitutionality of criminalizing adultery in this state. As for suing Orlando Wolf or someone else, that's a whole different set of questions that we should definitely consider, but only after we work through these other issues."

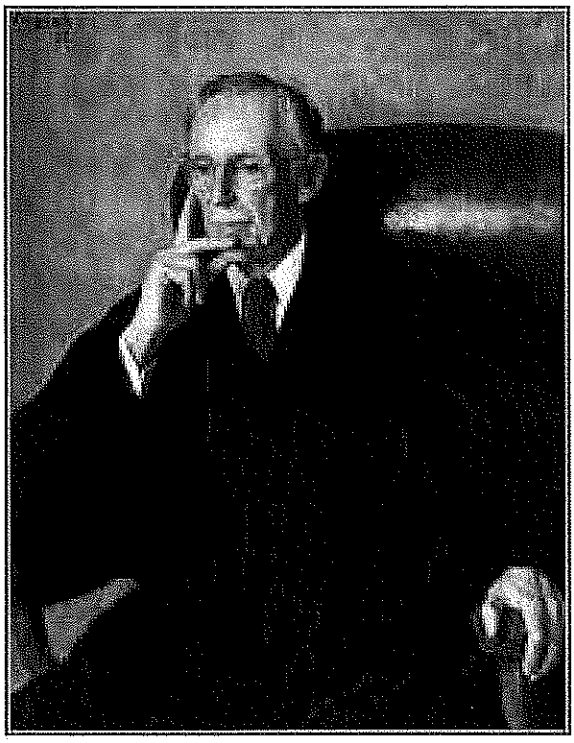
You take a deep breath. There are a lot of issues here. But Virginia needs your help and you are interested in her case. Draft a memo to yourself that identifies the constitutional law issues, arguments, and counter-arguments her case presents and how you think they would likely be resolved in a court of law.

Organizational Tip:

Use subheadings to distinguish the three tasks set for you by this client: (1) evaluation of the facial constitutionality of the Defense of Federalism Act, (2) evaluation of an as-applied challenge to any criminal prosecution of Virginia under the state's adultery law, and (3) the potential for any lawsuits that Virginia might wish to file as a plaintiff.

QUESTION THREE

(Weight: Approximately 25% of the final exam grade)



A rather famous alumnus of the Washington & Lee School of Law once wrote, "Substantive due process has at times been a treacherous field for this Court. … That history counsels caution and restraint. But it does not counsel abandonment, … ."

Discuss each of these three sentences, drawing on both the constitutional theories and the judicially established doctrines that you have studied in this course. Then defend your own opinion about the merits of this person's particular conclusion.

Make sure your defense is based on constitutional types of arguments, since as Philip Bobbitt observed, outside of constitutional argument "a proposition about the U.S. constitution can be a fact, or be elegant, or be amusing or even poetic, and although such assessments exist as legal statements in some possible legal world, they are not actualized in our legal world."

This is an example of a short-answer exam.

Civil Procedure II – Sections 2 & 3
Professor Thornburg
May 12, 2006

Exam PIN

COPY

FINAL EXAMINATION
Time: 2 hours

Directions

This examination consists of 12 short answer questions. Each of the short answer questions is worth the same number of points. Check to be sure that your copy of the examination contains pages sequentially numbered 1 through 11. You may answer the questions either on a computer or in the exam book itself.

This is an OPEN BOOK examination; you may have any *printed or written* materials you wish during the exam. You may not have any device (including but not limited to computers, personal data assistants, and telephones) capable of either storing, accessing or transmitting any information except that you may have a computer with SofTest installed, and you must start SofTest and re-start your computer in safe mode for the duration of your examination. You may not "cut and paste" information from any source into your exam answers.

Be sure that you have written your PIN on this exam before turning it in. You should turn in the exam itself even if you take the exam on your computer.

Answer Format

Read the question carefully. Discuss only the issues raised. Fully explain the basis for your answer, which should be well organized and written in complete sentences. If you are hand-writing your answers, write them in the exam booklet itself. The answers should fit in the lines provided if you have average sized handwriting. Many questions will not require you to use all the space provided. If you feel that the answer requires more space, you may turn the page over and write on the back. I suggest that you not do this too often, or you may run out of time before completing all the questions. If you are typing the answers, most answers should be no more than 150 words long (and many may be shorter). If you feel that a few need to be longer, you may continue your answer, but be careful not to run out of time.

❄❄❄ **Good luck, and have a wonderful summer** ❄❄❄

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The following fact pattern applies to questions 1 - 3.

Arriving at his home after a long day at work, Gaylord Nelson was shocked to discover that several trees had been removed from his yard. After some investigation, Nelson sued George's Bush Service ("Bush"). Nelson claims that Bush's employees removed the trees without Nelson's permission. Bush denies liability.

Discovery reveals the following information:

- One of Nelson's neighbors saw a crew of men wearing identical light blue shirts removing trees from Nelson's yard on the date in question. Although the shirts had writing on them, the neighbor could not read it.
- In an interrogatory answer, Bush stated that its employees wear light blue shirts.
- Nelson has obtained affidavits from the owners of all the lawn and tree services listed in the local yellow pages, all of whom swear that their employees do not wear light blue shirts.
- Another of Nelson's neighbors testified in her deposition that she had arranged with George's Bush Service to have several trees removed from *her* yard that day, but that Bush employees never showed up to do the work.
- All of the workers who worked for Bush on the date in question have moved on to other positions, and neither Bush nor Nelson has been able to track any of them down.
- Bush's CEO James Watt denied in his deposition that either he or anyone who worked for him is responsible for the removal of Nelson's trees.

1. Assume that Nelson v. Bush is properly filed in federal court. After the close of discovery, Bush moved for summary judgment, going through the discovery record and pointing out that Nelson would have no witness who could testify that it was Bush employees who cut down the trees. Nelson responded with the discovery products and affidavits described above in the first four bullet points. Should the court grant the motion? Why or why not?

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2. Assume the same facts, except that summary judgment was denied and the case went to trial, with evidence consisting of the information discussed above. At the end of all the evidence, Bush moved for judgment as a matter of law, and the trial judge denied the motion. The jury returned a verdict for Bush. Nelson asked the judge to ignore the jury verdict and enter judgment for him instead. Should the judge do so? Why or why not?

3. In the alternative, Nelson filed a timely motion for a new trial. If the judge denies the motion for judgment as a matter of law, should she grant the new trial? Why or why not?

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The following fact pattern applies to questions 4 and 5.

Sean McNamara is a plastic surgeon residing in Omaha, Nebraska. Using technicians and equipment located in Nebraska, McNamara created a website advertising his practice. The website includes 1200 "Before and After" photos of McNamara's patients, showing the results of his work. Every page of the website contains the line, "copyright 1996-2006 Sean McNamara M.D." The copyright notice is in turn linked to a page that contains information about McNamara, including the fact that his practice is in Omaha and information on how to arrange a trip to Omaha for facial surgery. McNamara's patients come from around the world.

Christian Troy is also a plastic surgeon, but he resides in Malibu, California. In 2005, Troy established a website for his practice. The website displays numerous pictures of McNamara's patients, copied from McNamara's website, but it falsely states that these are Troy's patients. It also contains a button that interested persons can click to email Troy's office, and another that displays a map of Troy's office location. Troy also printed copies of the McNamara pictures in a notebook, and represented to potential clients that the photos represented Troy's work. Troy has never visited Nebraska, as he considers "those flat states in the middle" to be undeserving of his attention and, in fact, his only contacts with Nebraska are those related to the facts underlying this lawsuit.

McNamara sued Troy in the U.S. District Court for the District of Nebraska, claiming copyright infringement and breach of Nebraska's unfair competition law. He seeks damages in the amount of $100,000 and injunctive relief (requesting that Troy be ordered to take the photos off the website and stop showing them to prospective clients). Troy has filed a pre-answer motion to dismiss for lack of personal jurisdiction. In addition to asserting that he has never set foot in Nebraska, Troy asserts that the witnesses and physical evidence regarding his website, and witnesses regarding his conversations with potential patients are all located in California. He further asserts that he would lose considerable income, and his wife Kimber would be psychologically distressed if he had to spend time in Nebraska for the litigation.

4. Imagine that you represent Troy. What is your strongest argument that asserting personal jurisdiction over your client would violate constitutional due process?

COPY

5. Now imagine that you represent McNamara. What is your strongest argument that Nebraska may constitutionally assert jurisdiction over Troy?

The following fact pattern applies to questions 6 and 7.

Plaintiff Aspen Pharmaceutical Company produces a drug called Examzine. Aspen recently entered into a contract to sell 10,000 lots of Examzine to Defendant West Distribution Company. However, after the contract was made, the federal government banned the production

and sale of Examzine based on evidence that it could cause brain damage. Plaintiff obviously does not want to go to the expense of producing the drug if there is no real market. Nevertheless, because Defendant can sell the drug in other nations where it is still legal, Plaintiff worries that Defendant will sue it for breach of contract if it does not honor the terms of the contract. Plaintiff therefore wants to bring a declaratory judgment action in which it will ask the court for a declaration that the contract is void because of illegality.

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6. May Plaintiff Aspen bring this action in federal court, based on federal question jurisdiction?

7. Would your answer to question 6 change if the total contract value were only $20,000?

The following fact pattern applies to questions 8 through 10.

In March of 2006, *Good Morning America* ("GMA") did a show about sheets – more specifically, a show about thread count. The National Textile Association defines thread count as the number of threads running both horizontally and vertically in a square inch of fabric. For example, a sheet with a thread count of 400 would have 200 threads running vertically and 200 threads running horizontally. The higher the thread count, the more expensive the sheets, because the higher thread count sheets are softer and more comfortable for sleeping. The report on GMA disclosed that a number of national retailers were knowingly selling sheets with much lower thread counts than the packages listed.

On April 1, 2006, plaintiff Sleep Hotels, Inc. (a Texas corporation with its principal place of business in Texas) filed suit in state court in Beaumont, Texas against Wal-Mart (an Arkansas corporation with its principal place of business in Arkansas), claiming fraud, breach of warranty, and violations of the Texas Deceptive Trade Practices Act. Sleep Hotels has for years bought all of the sheets for its national chain of hotels from Wal-Mart, paying extra so that it could advertise itself as providing a superior night's sleep to its customers. It seeks damages in the amount of $80,000.

Two additional co-plaintiffs are also joined in the suit:

- Plaintiff Alice, a resident of Texas, who bought 4 sets of sheets labeled 1,000 thread count when in fact they were only 500 thread count (Wal-Mart counted a two-ply piece of thread as if it were two threads in violation of a ruling from the Federal Trade Commission). She seeks $200 in damages.
- Plaintiff Barbara, a resident of Arkansas, who has bought about 10 sets of sheets during the past three years, labeled as 600 thread count when they were actually 300 (she always buys sheets as wedding presents, and seeks $500 in damages).

8. Could plaintiffs properly have filed this suit in federal court?

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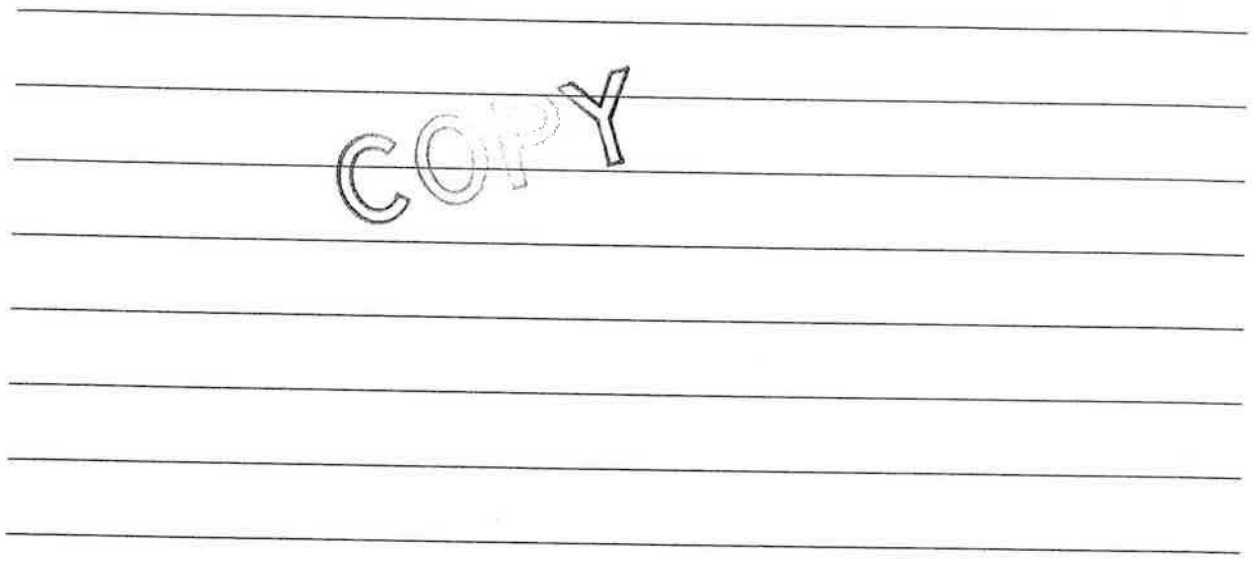
9. Assume for purposes of this question only a slightly different procedural posture. Sleep Hotels and Alice sue Wal-Mart and SheetSheet Company, Wal-Mart's supplier (an Arizona corporation with its principal place of business in Tennessee). Can they file their lawsuit in federal court?

10. Another lawsuit has been filed arising out of the same sheet-quality issue. Claire, another purchaser of mis-labeled sheets, sued Bed Bath & Beyond ("BBB") (a New Jersey corporation with its headquarters in New Jersey) in state court in New Jersey, Claire's home state. Claire filed her suit individually and on behalf of a class of all New York and New Jersey citizens who have purchased mis-labeled sheets from one of BBB's New Jersey stores. Her complaint estimates that there are about 100,000 class members (75,000 from New Jersey), each of whom overpaid about $55 for sheets. (This is also the amount of Claire's damages). New Jersey's consumer protection law, under which they sue, provides that New Jersey law should allow recovery for plaintiffs from any state, so long as the defendant does business in New Jersey. Claire filed her lawsuit in state court in New Jersey. BBB removed it to federal court. Should the federal court keep the case?



The following fact pattern applies to questions 11 and 12.

WorldWide Hotels, a citizen Texoma, has sued Linens 'N Things ("LNT") (a Delaware corporation with its principal place of business in New Jersey) in federal district court for the Southern District of Texoma. WorldWide purchased thousands of dollars worth of sheets from LNT, which were labeled as 1,000 thread count but were actually only 200 thread count, resulting in an overcharge that WorldWide estimates at approximately $150,000. Two weeks prior to trial, WorldWide (which was outraged but wanted to continue to do business with LNT) had offered to settle the case for $50,000 but LNT rejected the offer. The settlement offer was in the form of a formal "offer of judgment." (see below) The case went to trial, and the jury returned a verdict in favor of WorldWide for $100,000.

Rule 68 of the Federal Rules of Civil Procedure provides that if a defendant makes a settlement offer in the form of a formal "offer of judgment," and the plaintiff rejects the offer there can be serious consequences: even if the plaintiff wins the case, if its judgment is for less than the settlement offer, the *plaintiff* must pay the *defendant* its post-offer costs. This rule applies only to offers by defendants (not plaintiffs) and allows the award of costs but not attorney's fees.

Rule 68 of the Texoma Rules of Civil Procedure states that "at any time more than ten days before trial, *any party* may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions, and any offeree who rejects an offer and fails to obtain a more favorable judgment . . . shall pay the offeror's post-offer costs *plus reasonable attorney's fees* actually incurred by the offeror from the time of the offer." The Texoma rule thus allows both plaintiffs and defendants to make offers of judgment and allows the recovery of both costs and attorney fees. Texoma considers this rule to be procedural and applies it where applicable regardless of whose substantive law applies to other issues in the case.

Absent an offer of judgment, the applicable state law does not allow for recovery of attorney's fees in cases such as this. However, WorldWide has filed a motion for entry of judgment that includes $50,000 for attorney's fees incurred after its offer was made. LNT does not dispute that that sum represents a reasonable attorney's fee for the work done, but claims that the federal offer of judgment rule applies so that plaintiff may not use the offer of judgment device, and that even if they could, attorney's fees would not be recoverable.

11. What argument should LNT make that Federal Rule 68 is broad enough to cover the issue of whether WorldWide can recover the $50,000 in attorney fees? What opposing argument will it need to counter?

12. Suppose that the judge indicates that she does not believe that Federal Rule 68 is broad enough to cover the issue. What is WorldWide's best argument that the Texoma rule is outcome determinative?

COPY

This exam contains examples of true/false and multiple choice questions as well as short answer questions an an essay.

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SMU School of Law
Real Estate Transactions - Exam
Fall 2004
Professor Camp

The exam consists of ten true false questions equal to two points each, five multiple choice questions equal to two points each; ten short answer questions equal to two points each; and one essay problem equal to fifty points. The exam is closed book. Good luck!

COPY

TRUE/FALSE QUESTIONS

1. The standard Owner's Policy of Title Insurance promulgated by the American Land Title Association and used in Texas insures that the Owner possess good and marketable title to the property described in the policy.

2. As long as the Seller is willing to furnish a Title Insurance Policy, it does not matter to the Buyer whether the Seller conveys title by use of a General Warranty Deed or by a Special Warranty Deed.

3. An Exclusive Agency Listing entitles the Broker to receive a commission as long as the Broker is the procuring cause of the sale.

4. There is no need to obtain a survey in a residential real estate transaction because any survey issues are adequately addressed by title insurance and surveys are only needed for commercial real estate transactions.

5. Texas has adopted the Uniform Vendor and Purchaser Risk Act in the Texas Property Code.

6. Texas has adopted the Electronic Transactions and Signatures Act.

7. If a predecessor in a purchaser's chain of title acquired title under a forged deed, the purchaser's title will always be defective because a forged deed is inadequate to transfer title.

8. Mortgage foreclosure in Texas requires action by the court to order the sale of property.

9. A suit for specific performance is the remedy at law whereby one party to the contract asks the court to compel the performance of the contract by the other party.

10. Generally, if a Deed is held to intend to convey property "in gross" the exact quantity of land is not material as each party takes the risk of the actual quantity varying.

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MULTIPLE CHOICE QUESTIONS

1. To determine the rights of parties to a purchase and sell agreement involving real estate, the first place the attorney should search is:

   a. The general statutory law of the jurisdiction where the property is located.

   b. The case law of the jurisdiction where the property is located.

   c. Treatises in the area and law review articles addressing the issues.

   d. The terms of the contract between the parties.

   e. All of the above.

2. A "Wild Deed" is generally understood to be:

   a. A deed describing unimproved "rural" acreage.

   b. A deed in which the legal description is incomplete or does not adequately describe the property.

   c. A deed outside the normal chain of title.

   d. A deed which does not comply with the state's recording act in form or format, such as failing to be properly acknowledged.

   e. d and c above.

3. A Vendor's Lien arises:

   a. In every contract for the sale of real property.

   b. To secure the unpaid portion of the purchase price for real property.

   c. Only if the parties to the contract specifically provide for a vendor's lien.

   d. All of the above.

   e. a and b above.

4. The "premises" clause of the deed contains:

   a. The names of the grantor and grantee.

   b. The grantor's signature.

   c. The words of grant and background facts and purposes.

d. The interest taken in the property.

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e. a and c above.

5. According to the Doctrine of Merger:

a. The parties' rights in the contract remain enforceable after the execution and delivery of the deed because they are independent and do not merge into the deed.

b. Where a deed is executed and delivered pursuant to a contract of sale of realty, the latter merges with the former and becomes void.

c. Neither a nor b above.

d. The rights of the parties concerning merger are always governed by the contract of sale.

e. Both a and d above.

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SHORT ANSWER QUESTIONS

1. Please discuss the theory of Equitable Conversion with regard to the risk of loss in the purchase of real property.

2. What is the difference between Marketable Title, Record Title and Insurable Title?

3. What is the purpose of the Habendum and Warranty Clause in a Deed?

4. List and describe the 6 title covenants generally contained in a deed.

5. What is the difference between a Lis Pendens Suit and a Suit to Quiet Title?

6. Explain the application of the concept of Reciprocal Negative Easements.

7. What are the three forms of notice which generally operate to defeat subsequent purchasers in notice and race notice jurisdictions?

8. Discuss the difference between a Ground Lease and a Standard Lease.

9. List as many potential participants as you can in a typical purchase and sale transaction, i.e. the seller, purchaser . . . etc.

10. What is the standard of care that a lawyer is held to in defending claims of mal-practice in real estate transactions?

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ESSAY PROBLEM

John Smith, who is an officer of a major client of your firm, has come to you with a personal real estate issue involving some land owned by his wife. He has sent you the following memorandum and is asking your advice and assistance. After reviewing the memorandum, he wants to meet with you to discuss what his wife should do. What would you do to prepare for this meeting? What additional information would you want to know to be able to adequately advise John and his wife? What steps would you take to obtain this information. What courses of action would you suggest to John to resolve these issues his memo raises. What claims and rights and against whom, does his wife have. Does this fact situation raise any additional concerns for you as a lawyer in connection with the course of action you should take?

MEMORANDUM FROM JOHN SMITH

Point of Contact: John Smith
2000 Willow Street
Rural City

Regarding: Mary Ann Jones Smith and Jennie Louise Jones White
225.683 acres in Noman County
Establishment of clear title

Background:

1. On April 21, 1961 Joe Blow and Josie Blow deeded 233.15 acres to daughter Donna Blow Jones.

2. On April 5, 1961 Donna Jones exchanged 33.97 acres; (included in the tract in step 1) with her brother Billy Jones for 32.32 of his nearby acres, in an attempt to equalize the feet of frontage on State Highway 20.

- NOTE: While the dates do not appear to be in the proper order, it is clear that Joe Blow deeded property to all of his five children in April 1961, and the subsequent exchange between brother and sister was simply to equalize frontage.

3. In July 1992, Donna Jones died, leaving her property to daughters Mary Smith and Jennie White. Mary and Jennie own the property jointly and continue to pay all property taxes.

4. In 1994, Billy Jones deeded his property (which is adjacent to the subject acreage) to his daughter Verna, and attorney Old Coot, who prepared the transfer, failed to include the

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clause "SAVE AND EXCEPT the 32.32 acres exchanged by Billy Jones with Donna Jones" as described in step 2.

5. In June 2004, Mary and Jennie had the property (now 225.683 acres due to recent easements granted during the widening of SH 20) surveyed in anticipation of sale.

6. Surveyor stated that during his work, it came to his attention that there was a cloud on the title and he suggested contacting Bob Lewis at Good Title Co. in Open Gulch, regarding the problem.

7. Bob Lewis stated that he was aware of the problem because his title company had handled the recent sale by Billy's daughter Verna of her property. While Verna did not (and could not) sell the subject 32.32 acres, she did sell all of her nearby property which included the 33.97 acres exchanged in step 2.

8. The attorney who prepared the documents for Billy's deed to daughter Verna in step 4 above is Old Coot. Mr. Coot was County Judge for Noman County from 1970-1987, and was reelected in 1998. He is currently the County Judge for Noman County. Judge Coot's son is an attorney running his law office in Open Gulch while he serves as County Judge.

9. On July 7, 2004 Mary spoke by telephone with Young Coot, and described the problem in detail. Young stated that he would inform his father of the situation, and Judge Coot would return the call. After repeated calls and messages left throughout July 2004, Mary has not been able to make contact with Young Coot or Judge Coot.

10. Judge Coot is unwilling to acknowledge or correct the mistake in the deed in step 4. He may be using his position as County Judge as an excuse to "not practice law" while holding office.

11. Through discussions with Bob Lewis at Good Title Co., it is evident that Judge Coot is fully aware of the problem, but does not want to take responsibility for its correction.

12. Mary and Jennie want to establish clear title for the entire tract of land for ease of future sale. Without Judge Coot's cooperation, this has been impossible.

This is an example of a take-home examination. While this one does not impose a time or word limit, others may choose to use one of those devices to put limits on the length of answers and encourage focus.

COMPLEX LITIGATION EXAM
December, 2010
Professor Thornburg

Instructions

The general instructions that you received on November 22nd (and which are reprinted at the end of this exam) govern this exam, as does the law school honor code. In addition to those logistical instructions, please note the following:

- This exam consists of three questions. The percentage of raw points that can be earned from each subpart is indicated.
- This is an open book examination and *does not require any research* beyond the materials that were assigned for class or provided within this examination. Using the principles you've derived from those materials thoughtfully, especially comparing and contrasting the facts and holdings of the cases you've read with the hypothetical exam facts, should be a major component of your answers.
- You should assume for purposes of the exam that any substantive law provided with the exam is correct (even if you know that in real life it is not). You should also assume that the numbers, which are made up, would be roughly accurate. Also, assume that there are no statute of limitations issues that would affect the answer to any of the questions.
- Read each question carefully and respond to the question(s) asked. Each one asks you to draft a particular document for a particular audience or purpose – be sure to draft your answer accordingly.
- There is no word limit for the exam, but I encourage you to avoid *lengthy* discussions of the law that you do not apply in answering the question. Ask yourself whether what you have written relates to the issue the question asks you to address. If so, leave it in. If it's just general and non-relevant discussion of legal principles, on the other hand, leave it out unless it merely provides a short introduction or transition to the heart of your answer.
- Please strive for clear and grammatical writing in your answers. One of the benefits of a take-home exam is that it allows you the opportunity to organize your thoughts and edit your writing.

Background Facts – Applicable to All Questions

On April 20, 2008, there was a 60 minute "incident" at the Chernobyl, Texas nuclear storage plant. This plant is owned and operated by Oligopoly Company, a Delaware corporation with its headquarters near Amarillo in West Texas. The incident produced a radioactive cloud that drifted east across the state of Texas and then over parts of Oklahoma, Arkansas, and far western Tennessee before it dissipated. The incident itself resulted in the death of two employees and severe burns to eight others. Naturally this event has resulted in extensive publicity, and in litigation.

A number of individual and class actions were promptly filed in state and federal court, asserting claims of negligence under state law. All the class actions were removed to federal court under CAFA, as were any individual claims meeting the requirements for diversity of

citizenship jurisdiction. All of the federal lawsuits were then transferred to the U.S. District Court for the Northern District of Texas, Amarillo Division, by the Judicial Panel on Multidistrict Litigation, and assigned to Judge Nagareda.

A few individual lawsuits remain pending in state court in Texas as they were not removable. All but one of the suits seeks damages for personal injuries or lost farm income or both. The one outlier was brought by Lone Star Resort and Recreation Spa in scenic Caddo Lake, Texas, directly in the path of the radioactive cloud. Lone Star sued Oligopoly in state district court (Harrison County), alleging that it had already lost bookings due to the incident, and expects to lose more due to fear of the radiation. Lone Star seeks $1 million for lost profits and damage to its goodwill.

Pretrial Order No. 3 appointed a Plaintiff's Steering Committee, and Pretrial Order No. 4 required that the committee file a Master Complaint. The committee did so. The Master Complaint includes class action allegations for two classes, known as the personal injury class and the farmer class. All named plaintiffs and all class members are in at least one of the classes, and some are in both.

The *personal injury class* is defined as "all persons who were injured due to exposure to radioactive fallout from the April 20, 2008, incident at defendant's Chernobyl plant, either in the form of increased risk of cancer or otherwise, including both persons now living and any unborn offspring of persons exposed on April 20, 2008." Plaintiffs seek to require Oligopoly to establish and publicize a program of free medical checkups, testing for exposure-related conditions, for all members of this class for a ten year period. The program would also collect data for scientific research into the effects of radiation exposure. If necessary, plaintiffs seek "appropriate compensation" for any class member found to have contracted cancer as a result of exposure to radioactive material discharged during the incident. The class representatives for this class are eight adults, two each from Texas, Oklahoma, Arkansas, and Tennessee, each of whom alleges exposure to radioactive fallout from the cloud produced by the April 20 incident.

The *farmer class* is defined as "all persons who own or operate farms that received radioactive fallout from the April 20, 2008, incident at defendant's Chernobyl plant and who (1) are or will be unable to utilize such land for farm production due to contamination of the land, or (2) are or will be unable to market farm produce of such land due to contamination of the land." Plaintiffs seek an order requiring Oligopoly to decontaminate all contaminated farm land, and also seek compensatory damages for all farm products that cannot be marketed due to radioactive contamination. There are four class representatives for the class: a Texas dairy farmer who alleges that local health authorities have ordered her to discard all milk produced on her farm since April 20; an Oklahoma farmer who has recently planted corn, an Arkansas turkey farmer, and a Tennessee farmer who grows organic vegetables and has been forbidden to market them since the radioactive cloud passed over.

Question One (50%)

In the federal MDL, the parties actively engaged in discovery. Based on the information this has revealed, the Steering Committee filed a Motion for Class Certification of the two

classes identified in the Master Complaint. The court held a hearing on the motion. The parties agreed on the following facts:

- The radioactive cloud gradually widened as it moved farther from the plant.
- Radiation-based cancers are indistinguishable from those that occur naturally or that are caused by other chemical carcinogens. As is true for many types of cancer, factors such as smoking, drinking, and diet also may contribute to the disease.
- Although the amount of fallout on the ground also dissipated as the cloud moved eastward, local authorities in all four states required farmers in the path of the cloud to destroy dairy products and other crops produced for human consumption.
- In total, some 150,000 square miles were affected in the four states before the cloud dissipated to the point that measurable traces were no longer found. Approximately 8 million people reside in this area.
- Approximately 5,000 non-residents were also exposed to the cloud as they drove through the states on April 20-21.

The parties disagreed, and submitted expert testimony, on other issues:

- Affidavits submitted by Oligopoly's expert, Montgomery Burns, states that the cloud had dissipated sufficiently by the time it reached Arkansas and Tennessee that exposure there should create no risk of radiation-related health problems to persons or property. He also opined that the risk of cancer from the levels of radiation in the cloud even in western Texas and Oklahoma was extremely low.
- Plaintiffs' expert, on the other hand, testified that radiation levels were still measurably high enough in Arkansas and Tennessee to cause health risks, both directly and through contamination of the ground. Plaintiffs' expert also testified that exposure at the levels caused by the cloud can increase the likelihood of various cancers, and that it may take a number of years for cancers caused by radiation to develop.

The parties have also briefed a number of legal issues relevant to the class's claims. First, under the federal Price-Anderson Act, Oligopoly's *maximum* aggregate liability for a single nuclear incident, including costs of defending suits, is capped at $600 million, an amount that is covered by various forms of insurance. (Oligopoly's primary assets are thus protected from the class members' claims, as the law intends to protect the nuclear power industry.) Based on its position that most persons exposed to the cloud cannot have suffered any injury, Oligopoly asserts that there is no likelihood that its aggregate liability to members of the two classes would reach such a sum, although it admits that the cost of cleaning up contaminated farm land is difficult to estimate. Plaintiffs, on the other hand, predict that the aggregate value of the recovery they seek could easily exceed $1 billion.[1]

Second, briefing indicates that there are some potentially relevant differences in state law. These differences revolve around two issues. First, with regard to medical monitoring claims,

[1] For purposes of the exam, disregard any arguments that might be made about preemption by federal nuclear regulation and assume that, except for the limit on aggregate liability, all claims asserted against Oligopoly are governed by state law.

Texas only allows a medical monitoring remedy for persons who can demonstrate some kind of existing physical manifestation of disease, while Oklahoma rejects medical monitoring as a remedy. Arkansas allows medical monitoring to be ordered based on significant exposure, without the need for present symptoms, and Tennessee courts have not yet had the opportunity to decide whether to adopt medical monitoring as a remedy for exposure to potentially carcinogenic substances. Second, the states differ with regard to whether negligence claims can support an award of economic losses. Only Arkansas allows recovery for pure economic harm in the absence of physical harm to person or property when the plaintiff's cause of action is based on negligence. The plaintiffs argue that these differences in the law are irrelevant, or manageable or -- if multiple laws create class certification problems – that Texas law can apply to all issues as it is Oligopoly's headquarters.

The Steering Committee wanted to keep all of its options open, and so it has argued that the class could be certified under Rule 23(b)(1) (as a limited fund); Rule 23(b)(2); and Rule 23(b)(3). The committee also contends that all of the requirements of Rule 23(a) are satisfied.

You are Judge Nagareda's law clerk. He is uncertain of how he should handle the class issues in this litigation, and has always found it helpful to get his law clerk's input in the form of a potential opinion. Please prepare for him a draft opinion ruling on the plaintiffs' Motion for Class Certification that addresses both proposed classes under each section of Rule 23,[2] resolving each issue in the way you think best reflects class action law. Because there are two proposed classes, Judge Nagareda has asked you to include a discussion of whether, if both of the classes don't meet certification requirements, the cases could go forward with some but not all issues certified for class treatment.

[2] You should assume for purposes of this question that all parties concede that the members of the steering committee, who would become class counsel (half for the personal injury class and half for the farmer class), meet the adequacy requirements of Rule 23. Everyone also concedes that the numerosity requirement is satisfied. So Judge Nagareda's opinion need not discuss either of those issues.

Assume for the rest of the exam that Judge Nagareda (rightly or wrongly) refused to certify any issue or group for class treatment. However, the claims of the actual plaintiffs (and some additional intervening plaintiffs) remain pending in Judge Nagareda's court where further discovery continues, and where Oligopoly plans to file a motion for summary judgment eliminating many of the remaining plaintiffs' claims.

Question Two (20%)

The day after Judge Nagareda's ruling denying class certification, Oligopoly approached Homer Simpson, the lawyer representing Lone Star and began to talk global settlement. The result a week later was an agreed motion, filed in Lone Star's action in the Harrison County, Texas court, to certify the case as a class action, approve the settlement as fair, reasonable, and adequate, and enter a judgment that incorporates the terms of the settlement. In addition, the owner of Lone Star intervened as a plaintiff to represent exposed persons with personal injury claims. Just to be safe, Simpson also paid a referral fee and "acquired" Helen Lovejoy, one of the MDL plaintiffs, as a client, and she intervened as a plaintiff in the state case, complaining of radiation exposure and damage to her farm. (Both the Lone Star owner and Lovejoy were exposed, but neither is at present suffering any apparent physical result of the radiation exposure). Lone Star's corporate claim for lost income and lost good will was severed into a separate lawsuit, settled separately, and has been dismissed pursuant to that settlement.

The settlement class is composed of "all persons in the United States who suffered any personal injury, including increased risk of cancer, or any form of economic harm related to the radioactive fallout from the April 20, 2008, incident at defendant's Chernobyl plant."

The settlement provides the following relief to class members, in return for their complete release of all claims against all persons: 1) Oligopoly will create a medical monitoring program for all radiation-sensitive cancers until the end of 2011; 2) Oligopoly will open its medical clinic in Chernobyl, Texas, to class members, and will provide free care there for anyone developing cancer as a result of the exposure; 3) Oligopoly will remove any detectable radiation resulting from the April 20 incident from the property of class members who document their need for the removal; 4) Oligopoly will fund a national advertising program to promote the safety of agricultural products from the four affected states; and 5) Oligopoly agrees to adopt a number of new safety precautions to prevent any similar incident from happening in the future, and to have the enforcement of those measures monitored indefinitely by a Special Master appointed for that purpose, to be paid by Oligopoly. Finally, Oligopoly agrees not to oppose Simpson's attorney fee request up to $50 million (which the agreement estimates is 25% of the cost of the measures that Oligopoly agrees to take under the settlement agreement). Lone Star and Oligopoly maintain that this should be certified as a (b)(2) class, and so the settlement provides no opportunity to opt out. Judge Silver, the Harrison County judge, grants preliminary approval to the settlement, and orders notice to the class in an extensive campaign.[3]

[3] Assume for purposes of the exam that the Texas class action rule as written is identical in every relevant respect to Federal Rule 23. Texas courts consider federal interpretations of Rule 23 to be persuasive but not binding authority on the meaning of the Texas class action rule.

The MDL Plaintiffs' Steering Committee is appalled by this settlement. They intend to ask Judge Nagareda to enjoin any further activity in Lone Star's case under the All Writs Act.

You are the newest attorney at the firm of Contingency & Contingency, which represents Kimberly Wells, one of the plaintiffs in the MDL. Your boss, Laura Contingency, is a member of the Steering Committee but is a bit worried about whether Judge Nagareda has the power to issue such an injunction. She has asked you to prepare a Briefing Paper that she can circulate to all of the Steering Committee members discussing what plaintiffs will have to argue to get the injunction, as well as the arguments they should expect Oligopoly to make in opposition to it.

Assume that (whether rightly or wrongly), Judge Nagareda refused to grant the injunction. The MDL Steering Committee therefore wanted to find a different way to stop Judge Silver from certifying the class and approving the settlement.

Question Three (30%)

After a strategy meeting, the Steering Committee chose Ned Flanders (a personal injury class member) and Ole McDonald (a farmer) to object to the settlement. At the fairness hearing in the Texas state court, Simpson and Oligopoly's lawyer represented to Judge Silver that the settlement was a good deal for everyone, given the legal and evidentiary issues facing the plaintiffs and the relief that Oligopoly agrees to provide in the settlement agreement. When they were done with their 50 minute presentation, Ned and Ole argued that the settlement was a collusive sellout of the class and that Homer has not earned a $50 million fee.

Judge Silver listened to the objections, but nevertheless approved the settlement and certified the mandatory class. In his one paragraph order, he recited that Oligopoly acted on grounds generally applicable to the class, that the class was sufficiently numerous, that there was a common question of law, that the named plaintiffs' claims were typical of the claims of class members, and that both they and Homer adequately represented the class. He then pronounced the settlement fair, adequate, and reasonable, and awarded Simpson $45 million in fees and expenses. Judge Silver entered a final judgment based on the settlement. Flanders and McDonald have appealed, but under Texas law judgments are final for purposes of claim and issue preclusion (aka res judicata and collateral estoppels) even while on appeal. Texas also follows the majority rules on claim and issue preclusion that we have discussed in this class.

That was about six months ago. You are a lawyer in Contingency & Contingency's Arkansas office, and you have been approached by two potential clients: Richard Adams, the owner of a gas station in Hot Springs, and Jack Godell, a resident of Arkansas who was working in Chernobyl, Texas at the time of the incident and who was exposed to the radioactive cloud on April 20, and also further exposed while volunteering as a cleanup worker outside the plant. Adams seeks damages for lost income due to the loss of tourists buying gas in the summer of 2008, and Godell alleges that his exposure to the cloud-based radiation caused his leukemia. They want the firm to file a lawsuit against Oligopoly on their behalf in federal court in Arkansas. A little research reveals that Arkansas would probably apply its own law to the negligence and damages claims in such a lawsuit (and therefore so would a federal court sitting in Arkansas). Neither Arkansas nor Texas, however, has ruled on the application of preclusion principles in the class settlement context.

The firm would love the business, but the partners are concerned about that Texas class action judgment. While you recognize the problem, you believe that these new potential clients got a bad deal. In order to take the case, you will have to make an argument to the firm's management committee that the potential recovery for the clients and the firm exceed the probable costs of achieving a settlement or a victory in the lawsuit, taking into account the various risks involved. They've asked you to write them a memo addressing the following issues:

- How should they expect Oligopoly to respond to a suit by Adams and Godell (in addition to a denial on the merits)?
- What legal arguments should the firm be prepared to make in response to Oligopoly's arguments? Are any of them likely to succeed?
- Will the firm need to present evidence in support of its legal arguments (and if so, what)?
- Are there any other factors or strategies the firm should consider regarding the risks or benefits of this lawsuit?

Then, of course, they want your bottom line recommendation: should the firm agree to represent Adams and/or Godell to pursue their claims?